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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re:

WORLDCOM, INC., et al.,

Debtors.

Parus Holdings, Inc.,

Appellant,

v.

WorldCom, Inc., et al.,

Appellees.

Chapter 11  
Jointly Administered

Case No. 02-13533 (AJG)

Case No. 07-cv-10507 (BSJ)

ECF Case

**APPENDIX TO OPENING BRIEF FOR**  
**APPELLANT PARUS HOLDINGS, INC.**

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Dated: January 4, 2008

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EffectNet, LLC

1 UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

2 -----x  
In re

Case Nos.  
02-13533(AJG)

3 WORLDCOM INC., et al.,

New York, New York  
March 12, 2007  
10:09 a.m.

4 Reorganized Debtors.

5 -----x

FINAL TRANSCRIPT

6 DIGITALLY RECORDED PROCEEDINGS

(Proceedings - Entire Day)

7 10:00 Motion by Debtors to compel Claimant Parus Holdings Inc.  
to appear for a properly noticed Rule 30(b)(6) deposition.  
8 Objection filed. 2

9 10:00 Motion by Debtors to apply Bankruptcy Rule 7068 (offer  
of judgment) to the proceedings on claim nos. 11242 (replacing  
10 9291) and 11173 (replacing 9293).  
Response by Parus Holdings Inc. filed. 24

11 B E F O R E:

12 THE HONORABLE ARTHUR J. GONZALEZ  
13 United States Bankruptcy Judge

14 A P P E A R A N C E S:

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22  
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24 Proceedings Recorded by Electronic Sound Recording,  
25 Transcript Produced by Court Reporter

1 JUDGE GONZALEZ: Please be seated.

2 All right. Let's begin then with the WorldCom  
3 matters. We have a motion by the Debtors to compel Parus  
4 Holdings to appear for a properly noticed Rule 30(b)(6)  
5 deposition.

6 MS. MURDOCK: May it please the Court, Allison Murdock  
7 on behalf of the Debtors, Your Honor.

8 JUDGE GONZALEZ: Is there anyone on the phone?

9 (Whereupon, no response was heard.)

10 JUDGE GONZALEZ: Just speak louder, though.

11 MS. MURDOCK: Yes, sir. Your Honor, the Debtors have  
12 moved to compel Parus to produce a Rule 30(b)(6) witness to  
13 testify regarding e-mail and other electronic information  
14 systems, its document preservation practices, and the identity  
15 of people responsible for carrying out those practices.

16 This discovery is relevant to whether documents exist  
17 to support a new damages theory that Parus now has offered for  
18 the first time in its spoliation motion or to support Debtors'  
19 defense to that new damages theory. It is also relevant to  
20 Parus' claim that Debtors' retention of electronic data on  
21 backup tapes was unreasonable and is sanctionable and the  
22 issue of whether the documents Parus claims Debtors' destroyed  
23 ever existed in the first place. Finally, the Rule 30(b)(6)  
24 deposition is relevant to the issue of cost-shifting and what  
25 constitutes reasonable industry practices for storing

1 electronic data.

2 Federal Rule 26(b)(1) expressly authorizes discovery  
3 regarding the existence, description, nature, custody,  
4 condition and location of documents and the identity of  
5 persons with knowledge of discoverable matters, and this is  
6 exactly the nature of deposition that the Debtors wish to take  
7 of Parus' Rule 30(b)(6) witness. This is the exact nature of  
8 discovery that Parus has already taken of Debtors, and Parus  
9 should not be heard now to state that the nature of a party's  
10 e-mail systems and how and where they store documents and the  
11 people responsible for that is not a relevant inquiry when  
12 Parus itself has made inquiry of the Debtors on these points.

13 Now, at a minimum the discovery the Debtors seek is  
14 relevant to what documents exist to support this new claim set  
15 forth in Parus' spoliation motion -- a claim that Debtors  
16 submit cannot be brought at this late stage of the litigation  
17 in any event. That claim is that Parus now claims that it is  
18 entitled to \$50 million to \$80 million in "expectation  
19 damages" simply on its breach of contract claim.

20 Parus has not produced any documents in this case  
21 evidencing that it had an expectation on its contract claim of  
22 damages in this amount, so the Debtors are entitled to  
23 discover what sources of documents there might be to support  
24 Parus' claim or to support Debtors' defense to that claim.

25 Now, Ms. Murch's February 14th letter to the Court in

1 response to the informal conference on this motion to compel  
2 for the first time disclosed that Parus, like the Debtors,  
3 maintains documents on backup tapes. This was never disclosed  
4 to the Debtors before. We don't know how many backup tapes  
5 Parus has, what the time frame is for those backup tapes, what  
6 search terms were used to search tapes, and what documents  
7 were found on the tapes.

8 Rule 26(b)(1) specifically authorizes Debtors to  
9 conduct this Rule 30(b)(6) deposition of Parus in order to  
10 obtain the information, the very type of information that  
11 Parus has already obtained from the Debtors. The information  
12 that the Debtors seek also is relevant to this spoliation  
13 motion.

14 In response to Debtors' motion to compel, Parus simply  
15 says that its spoliation motion doesn't hinge on whether it  
16 stored documents in the same manner that Debtors stored  
17 documents, but Debtors' motion to compel has given the Court  
18 example after example of where Parus is claiming in its  
19 spoliation motion that Debtors should be sanctioned simply  
20 because they used backup tapes to store electronic data.  
21 Parus does not dispute that this is a component of their  
22 spoliation motion. Their response to the motion to compel  
23 just didn't even speak to this portion of the motion filed by  
24 the Debtors. But there can be no dispute -- and this is at  
25 page 10 of our memorandum in support -- that that is a

1 component of Parus' spoliation motion.

2           The Debtors should be able to defend the  
3 reasonableness of their conduct in using backup tapes by  
4 making inquiry of Parus as to whether they used backup tapes  
5 as well. It goes to the reasonableness of the systems used to  
6 store electronic data. The discovery is also relevant to  
7 determine whether the documents Parus claims the Debtors  
8 destroyed ever existed in the first place, as will be set  
9 forth in our opposition of the spoliation motion. That is a  
10 critical component of spoliation -- whether there was evidence  
11 that existed that now doesn't exist.

12           Parus claims that it had expectation damages on its  
13 breach of contract claim of \$50 million to \$80 million, but it  
14 hadn't produced any documents that would show that it had an  
15 expectation on its contract to earn those kinds of dollars.  
16 So the Debtors should be entitled to do discovery of the  
17 source of its documents, how it maintains those documents.  
18 All that is required, as provided for in Rule 26(b)(1), to see  
19 whether these expectations that Parus' claims it has, whether  
20 documents ever existed to support those expectations in the  
21 first place.

22           Finally, Your Honor, on cost-shifting whether the  
23 Debtors followed industry standards in using backup tapes to  
24 maintain electronic data is relevant to the cost-shifting  
25 motion. Your Honor already has said twice that that could be

1 a relevant or is a relevant factor concerning the  
2 reasonableness of the Debtors' actions.

3 Now, Parus complains that it can't be used to look at  
4 industry standards, because it is not in the same industry.  
5 But it certainly is close enough, Your Honor. There is no  
6 requirement that it be identical industries to be probative  
7 from Parus, but what certainly is the case is that if Parus --  
8 a much smaller company than WorldCom -- was using backup tapes  
9 to store electronic data, then that certainly goes to the  
10 reasonableness of the company the size of the WorldCom with  
11 over 38,000 employees using the same types of procedures to  
12 store electronic data. That would certainly go to the  
13 reasonableness of the Debtors' conduct and the industry  
14 standards used by the parties.

15 The Debtors are not asking the Court to find at this  
16 time that the outcome of the discovery it seeks is going to  
17 determine cost-shifting or is going to determine spoliation.  
18 We are simply trying to take discovery that is specifically  
19 authorized under Rule 26(b)(1) and it certainly is appropriate  
20 in this case where, as Your Honor has already found in other  
21 motions to compel when judicial intervention is invoked, the  
22 scope of the discovery should be based on the needs of the  
23 action. The Debtors should be entitled to judge the  
24 reasonableness of their actions by looking at what Parus  
25 Holdings did as well.

1           So we ask that Your Honor compel Parus to appear for  
2 the Rule 30(b)(6) deposition, and then that Debtors be given a  
3 three-week extension from the date of that deposition to file  
4 their opposition to the spoliation motion.

5           JUDGE GONZALEZ: All right. Thank you.

6           MS. MURCH: Good morning, Your Honor. Jill Murch of  
7 Foley & Lardner on behalf of Parus Holdings.

8           Judge, there really is no basis for this motion to  
9 compel, and I will give you five reasons -- no less than five  
10 reasons -- why this motion should be denied. The first is the  
11 Debtors misconstrue the standard for spoliation under the  
12 Zubulake cases.

13           Now, the Debtors have said in a letter to the Court  
14 that they claim they need the information to determine whether  
15 Parus "stored electronic information in the same or similar  
16 manner as the Debtors." Yet, Your Honor, spoliation doesn't  
17 hinge on whether Parus and the Debtors stored electronic  
18 information in the same or similar manner. Spoliation is not  
19 based on a comparison of document retention policies.  
20 Instead, whether spoliation occurred depends on whether the  
21 Debtors failed to preserve evidence relevant to litigation at  
22 a time when they knew or should have known that evidence may  
23 be relevant to future litigation. In other words, the Debtors  
24 were required to implement a "litigation hold," yet they  
25 failed to do so, and discovery of Parus' document retention

1 policies does not speak to why the Debtors failed to implement  
2 a timely "litigation hold."

3           Indeed, the standard for the Zubulake spoliation case  
4 is clear on its face. It has three elements. That the party  
5 having control over the evidence had an obligation to preserve  
6 at the time it was destroyed. That the records were destroyed  
7 with a culpable state of mind, and that the destroyed evidence  
8 was relevant to the party's claim or defense. In short, a  
9 Rule 30(b)(6) deposition of Parus regarding Parus' document  
10 retention policies will in no way reveal or provide evidence  
11 explaining why the Debtors failed to implement a timely  
12 "litigation hold."

13           JUDGE GONZALEZ: Take me back I guess to the time  
14 frame. What is going on, in your view, at the Debtors' in  
15 terms of the backup information, and then what happens and  
16 what do you believe should have happened at the point in time  
17 either the Debtors knew or should have known that preservation  
18 was required?

19           MS. MURCH: Judge, you have heard a lot of references  
20 to backup tapes, but let me clarify for the record. A backup  
21 tape is nothing more than a secondary source. It is a  
22 snapshot in time of all electronic data that sat on a server.  
23 So, for example, I am in a case where there is a reasonable  
24 prospect of litigation. I may send 10 to 15 e-mails to you  
25 about this case. If I delete those e-mails before it hits the

1 backup tape, there is no record of it, Judge. It is lost  
2 forever. The backup tapes that the Debtors claim that they  
3 have all of this information on is simply a snapshot in time.  
4 What existed on that network, what existed on the server at  
5 the time the backup tape took a snapshot.

6 So if there is correspondence going back and forth  
7 that is deleted prior to that backup tape, it is gone forever.  
8 One of the points of the spoliation motion, Your Honor, is  
9 this: that the Debtors were under an obligation to implement  
10 a "litigation hold" to prevent that exact thing from  
11 happening, where I send e-mails to you and then delete them  
12 because I had no idea that they may be relevant to somebody  
13 that may be looking to them in the future.

14 The Debtors were under an obligation to issue a  
15 "litigation hold," as specified by the Zubulake case to say,  
16 "Don't destroy those e-mails. Don't destroy documents that  
17 may be on shared drives in electronic form. Don't do anything  
18 that would destroy or cause spoliation of evidence relevant to  
19 this case."

20 So while there is a lot of mention made of backup  
21 tapes, we have to really take it for what its face value is,  
22 and that is simply a snapshot in time. The Debtors were  
23 obligated, it is Parus' position, in July of 2001 to implement  
24 a "litigation hold" with respect to hard copy documents,  
25 electronic information, e-mails, electronic documents. Yet we

1 have testimony from Donald Ramsay, a Stinson lawyer, who is  
2 also counsel to the Debtors, who said that a notice to  
3 employees about a "litigation hold" didn't occur until 2004.  
4 The fall of 2004 and, in fact, Parus filed its proofs of claim  
5 in 2003. Why was there no "litigation hold"?

6 So that is our position, Judge, as to what the Debtors  
7 should have done.

8 Getting back to the issue of why this Rule 30(b)(6)  
9 motion is inappropriate at this time, as I mentioned  
10 Mr. Ramsay stated that the initial effort or the initial  
11 e-mail regarding documents didn't come until "early fall, late  
12 fall of 2004."

13 Furthermore, one other position -- and this is an  
14 answer in response to your question, Your Honor -- the  
15 spoliation motion asserts that the Debtors did not preserve  
16 records of Intermedia after July 1, 2001, as required by the  
17 Debtors' own document retention policy, its own written  
18 document retention policy. So any discovery about how Parus  
19 stored documents or how EffecNet stored documents doesn't help  
20 the Debtors show why they failed to abide by their own written  
21 document retention policy. Let me give you an example.

22 The Debtors failed to comply with their own written  
23 document retention policy when they failed to preserve an  
24 electronic document for James Renforth, and just a little  
25 background for the Court. James Renforth is a key employee of

1 Intermedia, who is the point person between Intermedia as well  
2 as Parus Holdings with respect to the contact in dispute.  
3 MCI's document retention policy says that information of a  
4 departing or terminated employee must be retained three years  
5 after the employee departed or is terminated. As in the case  
6 of James Renforth, his employment with Intermedia ended on  
7 July 27, 2001.

8           The Debtors were, therefore, if we do the math, under  
9 an obligation to preserve Renforth's electronic documents  
10 until July 27, 2004 by virtue of their own retention policy.  
11 This is actually well beyond 2003 when Parus filed its own  
12 proofs of claim, and the same holds true for other individuals  
13 at Intermedia. As a result, the question is: well, where is  
14 it? We have not gotten any of those records. They haven't  
15 been produced. When Mr. Ramsay, the Stinson lawyer, who was  
16 deposed on this very issue, was asked, "What did you find  
17 regarding James Renforth, when you undertook such extensive  
18 discovery searches?" All they could find, Judge, was his  
19 personnel file despite the fact they were obligated to keep  
20 his information for three years. More importantly, MCI's  
21 document retention policy says that all information needs to  
22 be stored in a readily retrievable format: "Also the program  
23 is designed to ensure that in the event that legal or  
24 financial problems do occur, the organization will have in a  
25 readily retrievable form the information it needs to defend

1     itself."

2             We have not seen anything of the like produced in this  
3     case, and so, therefore, a Rule 30(b)(6) deposition of Parus  
4     is not going to explain to the Court and is not going to  
5     explain to anyone why on earth the Debtors failed to comply  
6     with their own document retention policies.

7             Judge, another argument is that nothing could be  
8     discovered pursuant to Parus' Rule 30(b)(6) deposition that  
9     would relieve the Debtors of their duty to preserve evidence.  
10    The Debtors, for example, seem to suggest that they are  
11    somehow relieved of their discovery obligations so as long as  
12    they can prove that Parus did or did not do all of the things  
13    that the Debtors should have done. Judge, the only way Parus'  
14    own preservation practices could ever be relevant to the  
15    Debtors own obligations to preserve relevant documents is if  
16    Parus' conduct could absolve the Debtors from their spoliation  
17    of evidence. Obviously, this isn't the case nor is it the  
18    law.

19            The second point I raise for your consideration, Your  
20    Honor, is that unlike the Debtors, Parus has never stated that  
21    it cannot produce documents because they are inaccessible or  
22    unavailable. The Debtors have failed to provide any instance  
23    in all the reams of briefing that Parus destroyed evidence at  
24    a time it should have implemented a "litigation hold" and  
25    compare this with the litany of information that we have

1     tendered to the Court. That they failed to comply with their  
2     own written document retention policies with respect to  
3     Renforth, that they don't have anyone who can tell you what  
4     indices to 10,000 boxes of documents means. When deposed  
5     Mr. Ramsay was asked, "Do you know, is there anybody who can  
6     tell us what these entries mean on these indices to 10,000  
7     boxes that you say that you are going to produce?" And the  
8     answer was unequivocally, "No. That is why we gave the list  
9     to Parus. Maybe they could figure out what it meant." Well,  
10    how on earth can Parus figure out what the Debtors' indices  
11    mean?

12           In fact, at last month's hearing the Court agreed with  
13    Parus' position. The Court said, "From what I hear from Parus  
14    Holdings -- and at the moment it seems to be convincing --  
15    that you have jumped over the step, and the step being they  
16    are not able to produce the documents. If they are able to  
17    produce all of the documents that you are seeking that  
18    existed, why then would it be relevant to what steps they  
19    would have taken in terms of decommissioning computers, et  
20    cetera?"

21           Judge, Ms. Murdock's statement on the record is  
22    evidence of the very fishing nature of the Debtors' request.  
23    Well, that is all we are asking for -- is the deposition to  
24    see, if, in fact, all the servers maintained by Parus  
25    Holdings. Judge, there are a myriad of key differences

1 between Parus and the Debtors at this point in the litigation.

2 First, the Debtors cannot point to any information  
3 that has been destroyed by Parus. This is step one. Second,  
4 Parus has evidence that relevant documents are missing, both  
5 through sworn testimony through Ramsay and Renforth. In fact,  
6 Parus has produced to the Debtors e-mail from Renforth that  
7 the Debtors have never produced back to Parus. Why is that?  
8 Parus, unlike the Debtors, implemented a "litigation hold" and  
9 preserved documents in a timely fashion.

10 As I mentioned before, Judge, the backup tapes, we  
11 shouldn't get sidetracked by that, because simply they are  
12 just a snapshot in time.

13 Now, another reason that Ms. Murdock will address  
14 today is that the Rule 30(b)(6) deposition is necessary for  
15 cost-shifting, and I would like to address that now.

16 First of all, it is not necessary for cost-shifting.  
17 The Debtors misconstrue and misrepresent the standard for  
18 cost-shifting under the Zubulake I decision. Parus' document  
19 retention policies are completely irrelevant as to whether the  
20 cost of the Debtors' own document production should be shifted  
21 to Parus. Nowhere in the seven factor test set forth by  
22 Zubulake I did the Court require evidence of the document  
23 retention policies of a third party for the purpose of  
24 determining whether another party's cost-shifting request was  
25 appropriate.

1 Now, the Debtors allege that there is an industry  
2 standard for cost-shifting. This argument fails as a matter  
3 of law for a couple of reasons, Your Honor. The first is, I  
4 have not seen a case that says there is the industry standard,  
5 and that the Debtors are supposed to be judged by an industry  
6 standard. Clearly it is not in the hallmark Zubulake case.  
7 Second, Parus and the Debtors were not in the same industry.

8 Now, Ms. Murdock says "close enough," but why are we  
9 to take Ms. Murdock's position that they are close enough or  
10 her own opinion? Maybe the Debtors need to hire an expert to  
11 determine what industry standards are. We shouldn't base it  
12 on the Debtors' perception of what an industry is. I raised  
13 this in the briefing, Judge. Michael Jordan had a contract  
14 with MCI, but he certainly wasn't in the same industry as the  
15 Debtors. Simply because Parus has a contract with the Debtors  
16 does not mean they are in the same industry.

17 For example, Intermedia was acquired by the Debtors  
18 for approximately \$5.8 billion. This is according to  
19 WorldCom's 10K filed on March 13, 2002. It described their  
20 services, and they say we are the second largest carrier of  
21 long distance telecommunication services in the United States.  
22 "Our services include basic long distance, telephone service,  
23 dial around, collect calling, operator assistance, and calling  
24 card services." Conversely, Parus is a small, privately held  
25 company who acted as an integrator and a provider of

1 unidentified communications services. For example, "Find me  
2 Follow me" technology.

3 Third, even if the Debtors could unilaterally impose  
4 this industry standard on cost-shifting, which is not grounded  
5 in fact nor is it grounded in law, then they should be  
6 required to retain an expert who can say what the industry  
7 standards are.

8 Now, Judge, I want to point out to the Court -- and I  
9 think this is a very important fact -- the Debtors say that  
10 Parus has taken discovery on the issue of the Debtors'  
11 document retention policies, and so the Debtors likewise  
12 should be able to look into that same issue. Here is where  
13 that reasoning goes awry. The reason this Court ordered the  
14 depositions of the five IT personnel of the Debtors, was  
15 because Parus had informally requested cost-shifting, and the  
16 Court felt it was necessary for Parus to take those  
17 depositions in order to defend itself against a possible  
18 cost-shifting motion. Here, Your Honor, Parus has made no  
19 such cost-shifting request. We have not said the onus should  
20 be on the Debtors to pay for our document production.  
21 Therefore, there is no relevance here as to how Parus  
22 maintained its records.

23 Also the Debtors say that Rule 26 allows them to get  
24 this discovery, but what the Debtors failed to state is that  
25 the parties seeking discovery must make a prima facie showing

1 that the discovery sought is more than merely a fishing  
2 expedition. This is, according to Evans v. Calise, 1994 WL  
3 185696. Indeed, courts routinely decline to authorize fishing  
4 expeditions such as this.

5 Now, the Debtors say, "Well, this is a new damage  
6 theory. We are entitled to learn about the basis for the  
7 damages." I want to point out to the Court that the Debtors  
8 just served discovery on Parus regarding damages calculations  
9 three weeks ago. So for them to say there has been no  
10 document production regarding damages, "Well, give us a chance  
11 to respond to your document production, and we will tender  
12 whatever information we have that is relevant, subject to all  
13 applicable privileges."

14 I would also like to point out, if you look to the  
15 rider, Your Honor, of the 30(b)(6) deposition notice, nowhere  
16 is there any category for damages or how do you calculate your  
17 damages or what is the basis for anticipatory repudiation?  
18 Nothing along those lines. The rider to the Rule 30(b)(6),  
19 all it deals with is document retention policies and storage  
20 issues, which we have said is not at issue at this point. If  
21 they want discovery regarding damages, let them tender that  
22 discovery, but it is not going to come regarding a Rule  
23 30(b)(6) deposition regarding Parus' document production.

24 Your Honor, I would finally like to point out, and  
25 just as a point of equity, Parus served a Rule 30(b)(6)

1 deposition on November 15, 2006, almost four months ago, on  
2 the Debtors, regarding their policies of document retention,  
3 and this was also under the auspices of the Court saying you  
4 need something to defend against a cost-shifting motion.

5           The Debtors have refused to this day to produce their  
6 Rule 30(b)(6). We tried to work it out with them. We said,  
7 "Here, we will give you a written document request. Rather  
8 than tendering a Rule 30(b)(6) witness, go ahead and tell us  
9 about your "litigation hold." Go ahead and respond. If we  
10 deem them inappropriate, we would like to proceed." They gave  
11 us insufficient responses, we asked them to proceed, and they  
12 still have refused. But yet on 14 days' notice, they  
13 complained that they have not had a Rule 30(b)(6) deposition  
14 of Parus.

15           Judge, if you come before the Court, he who seeks  
16 equity must do equity, and we don't believe that is the case  
17 here.

18           JUDGE GONZALEZ: All right.

19           WorldCom, what is the status of the current request  
20 for the 30(b)(6) from your point of view as to Parus' request?

21           MS. MURDOCK: Parus' Rule 30(b)(6) notice on the  
22 Debtors?

23           JUDGE GONZALEZ: Yes. I am sorry. I was thinking a  
24 little ahead of myself. What is the status of that?

25           MS. MURDOCK: Your Honor, the Debtors provided a

1 25-page response to Parus Holdings' "litigation hold"  
2 questions, and Parus is the one that proposed doing these  
3 questions in written form, rather than deposition, based on  
4 our objection that the topic identified in Parus' Rule  
5 30(b)(6) notice on its face sought attorney/client privileged  
6 information.

7 Now, Ms. Murch has advised that the Debtors'  
8 "litigation hold" responses are insufficient, but Parus will  
9 not tell Debtors why they are allegedly insufficient. What  
10 the Debtors have proposed is that Parus advise the Debtors  
11 what is insufficient in the "litigation hold" responses, so  
12 that the Debtors can supplement those responses, just as we  
13 typically would in the meet and confer process. In terms of  
14 equity, it is very unfair for Parus to propose that we proceed  
15 on written "litigation hold" questions, and then unilaterally  
16 say that the Debtors' responses are insufficient, but then  
17 refuse to identify the manner in which those were  
18 insufficient.

19 So we have simply invited Parus, and, in fact,  
20 Ms. Murch has told me on several occasions that some letter  
21 will be forthcoming identifying the alleged deficiencies in  
22 the Debtors' "litigation hold" responses. The Debtors should  
23 be given the opportunity to correct that, rather than Parus  
24 just uniformly taking off the table the proposal that we do  
25 those in written form. So we are really talking about apples

1 and oranges here, Judge. If Parus will provide us a list of  
2 the issues that they have with our "litigation hold"  
3 responses, we can consider that and supplement it. Only until  
4 that process is finished, would it be appropriate for Parus to  
5 then proceed with depositions of in-house litigation  
6 counsel -- that is who they noticed up -- in-house litigation  
7 counsel for WorldCom on topics that are clearly, in the  
8 30(b)(6) notice, privileged on their face.

9 JUDGE GONZALEZ: All right. Go ahead and respond to  
10 the other arguments made.

11 MS. MURDOCK: Well Your Honor, obviously we are not  
12 here to argue the spoliation motion. Ms. Murch has spent  
13 quite a bit of time going through Parus' alleged allegations  
14 with respect to spoliation, but just a couple of points:  
15 Ms. Murch is trying to make some point that WorldCom hasn't  
16 produced e-mails that Parus has produced. But what Ms. Murch  
17 has failed to remind the Court is that we are in the middle of  
18 the sampling process. Parus selected tapes to be sampled for  
19 cost-shifting analysis. Those tapes were sampled. There are  
20 still over one hundred backup tapes that have to be restored  
21 and searched in this case. It is premature for Parus to be  
22 claiming spoliation, when the backup tapes have not yet been  
23 searched.

24 Now, the Debtors have asked permission to proceed with  
25 the filing of a cost-shifting motion. Parus is taking the

1 position that you can't do cost-shifting until spoliation is  
2 determined, but that is really putting the cart before the  
3 horse. In the Zubulake cases on which Parus relies, the judge  
4 was very clear that before you can get to the question of  
5 spoliation, cost-shifting has to be determined, backup tapes  
6 have to be restored, and the data searched, because until that  
7 time there is no way to tell whether there are any e-mails  
8 missing. That is very significant.

9 For Parus to be accusing us of not producing e-mails,  
10 when they know that there are over one hundred backup tapes  
11 that are waiting to be searched and reviewed for responsive  
12 documents, is really egregious.

13 Now, with respect to Rule 26, we are not going on a  
14 fishing expedition. The Debtors are trying to get discovery  
15 that they are expressly entitled to under Rule 26, discovery  
16 about Parus' documents and how they maintain those documents.  
17 There is no requirement in Rule 26 that we prove that there is  
18 some deficiency in Parus' document responses. There is no  
19 requirement that we prove how we are going to use that  
20 information in order to take the discovery. Rule 26  
21 specifically provides that we can take discovery about how  
22 Parus maintains their document responses.

23 This notion that the Debtors just served discovery  
24 three weeks ago on Parus' damages, and that we need to wait,  
25 is absurd, Your Honor. There has been damage discovery

1 pending for over a year. The 26(a)(1) disclosures were done.  
2 But what we have now in response to this spoliation motion is  
3 an allegation that on breach of contract alone they want \$50  
4 million to \$80 million. Every other time that they have  
5 mentioned their breach of contract damages in this case, Your  
6 Honor, it has been based on the terms of the contract.

7 Now, in their spoliation motion for the first time  
8 they have added \$50 million to \$80 million. That did prompt  
9 an initial document request. It absolutely did. But that  
10 doesn't mean that we are not entitled to do the discovery that  
11 is expressly provided for in Rule 26(b)(1). There is no  
12 requirement that the Debtors make some showing that Parus has  
13 failed to produce documents, although we submit that they  
14 have, in order to take that discovery. It is expressly  
15 provided for in the rule. We are just simply trying to take a  
16 deposition that is authorized under the rules themselves.

17 JUDGE GONZALEZ: All right. Thank you.

18 I will ask Parus Holdings this question first, and  
19 then I will hear from the Debtors. I think at this point one  
20 of my concerns is that I haven't really paid enough attention  
21 to this litigation to put in context many of the arguments  
22 that are made before me, and I am going to have to take some  
23 time to re-educate myself with respect to the issues, and then  
24 I think it would be easier for me to rule on this current  
25 matter.

1 With that said, my recollection is that in terms of  
2 discovery, the battle from the Debtors' standpoint is who is  
3 going to pay for the search, et cetera, and the production  
4 from the backup tapes, and that prompted then the  
5 cost-shifting motion which, in turn, either precipitated the  
6 spoliation argument or that was there in the first place, I am  
7 not sure. Has that motion been scheduled?

8 MS. MURCH: No, Your Honor. The Debtors have not made  
9 any cost-shifting motion. They made an informal request, but  
10 that was never scheduled and nothing was ever made of it.

11 JUDGE GONZALEZ: So we don't actually have the  
12 cost-shifting motion filed; is that right?

13 MS. MURDOCK: No. Your Honor, we would like  
14 permission to file it, but Parus insisted on taking that  
15 discovery first.

16 JUDGE GONZALEZ: All right. I think what I am going  
17 to have to do is: I will not be present here in the  
18 courthouse for a couple of weeks, but during that time I will  
19 focus on re-educating myself on the various issues, and then I  
20 will have a better understanding of how long it will take to  
21 make a decision with respect to what is before me today.

22 Now, coming back, though, my recollection is there was  
23 something concerning Parus Holdings that was before me prior  
24 to this; is that correct?

25 MS. MURCH: Yes, Judge. That is Parus' spoliation

1 motion. Let me just give you a little bit of a procedural  
2 background. What happened was, we filed this spoliation  
3 motion and we teed it up for hearing. The Debtors asked for  
4 an extension, which we granted. Then the Debtors said, "Well,  
5 we need a Rule 30(b)(6) in order to respond to the spoliation  
6 motion," to which we said, "No. You really don't." They  
7 said, "Well, we are not going to decide," and the Court then  
8 scheduled this hearing to determine whether this would be  
9 relevant to their defense of the spoliation.

10 JUDGE GONZALEZ: Aside from the spoliation, is there  
11 anything pending before the Court with respect to Parus  
12 Holdings?

13 MS. MURCH: That is correct, Your Honor.

14 JUDGE GONZALEZ: I am sorry. I wasn't clear. Is  
15 there anything other than the spoliation motion and what is  
16 before me today pending before the Court?

17 MS. MURCH: Yes, Your Honor. The Debtors filed a  
18 summary judgment motion.

19 JUDGE GONZALEZ: Now, that motion was filed and argued  
20 some time ago?

21 MS. MURDOCK: Right. It was fully submitted in  
22 January of 2006.

23 JUDGE GONZALEZ: That is what I thought. That is what  
24 we have turned to. I don't know if that was a partial or  
25 complete summary judgment?

1 MS. MURDOCK: Complete, Your Honor.

2 JUDGE GONZALEZ: So, obviously, if I rule in favor of  
3 the Debtors, the rest of this -- unless that ruling is  
4 reversed -- becomes moot?

5 MS. MURDOCK: Yes, Your Honor.

6 JUDGE GONZALEZ: If I deny summary judgment, then all  
7 of this then becomes very relevant.

8 I will schedule something I think the first week in  
9 April. Do either one of you have any conflict with April 3rd?

10 MS. MURCH: No, Your Honor. That is perfectly fine.

11 MS. MURDOCK: That is fine.

12 JUDGE GONZALEZ: I will set it up for April 3rd at  
13 10:00. The time may be adjusted and we will know by April 1st  
14 or April 2nd as to whether the ruling will go forward. All  
15 right. Thank you.

16 There is another matter that is on.

17 MS. MURCH: Your Honor, may I just interpose, prior to  
18 the Court's ruling on the summary judgment motion, Parus had  
19 filed a motion requesting that the Court stay its ruling on  
20 the summary judgment motion in order to consider the  
21 spoliation motion, and the reason is, we felt that the  
22 spoliation motion would have some bearing on the Debtors'  
23 summary judgment motion. That being, if the Court, for  
24 example, felt that evidence was destroyed, there would be a  
25 possible adverse inference or some other step the Court has

1 within its powers to take and, obviously, the Court can  
2 determine for itself if it feels that spoliation would be  
3 relevant to its summary judgment ruling. That was a request.  
4 We had filed a motion back, I believe, in October to ask the  
5 Court to consider spoliation when determining its summary  
6 judgment ruling.

7 MS. MURDOCK: Your Honor, that motion was withdrawn.  
8 There is no motion pending on that.

9 MS. MURCH: Your Honor, we withdrew, because the Court  
10 said, "Well, go ahead and get it on file before the summary  
11 judgment ruling." So that is why it was withdrawn and that is  
12 what we did pursuant to the Court's directive.

13 JUDGE GONZALEZ: All right. I remember that. I  
14 understand why. There was a concern by Parus Holdings that I  
15 would rule on the summary judgment motion before my ruling on  
16 the spoliation motion, and I said don't worry I wasn't going  
17 to rule on it in the near term. I will factor all of that in.  
18 I do remember that.

19 Now, with respect to the Debtors' motion to apply Rule  
20 7068 (offer of judgment) to proceedings on claims, are you  
21 here to proceed with that as well?

22 MS. MURDOCK: Yes, Your Honor.

23 JUDGE GONZALEZ: All right. Go ahead.

24 MS. MURDOCK: Your Honor, the Debtors have moved to  
25 apply Rule 7068 to this case so that they can make an offer of

1 judgment to Parus Holdings, and the offer of judgment will be  
2 based on the terms of the contract that forms the basis of  
3 Parus' claims here. As reflected in the Debtors' motion for  
4 summary judgment which was submitted last January, the Debtors  
5 submit that the contract at issue (a contract that the parties  
6 refer to as the "Unidentified Communications Contract" or the  
7 "UC Contract") controls here; that it precludes Parus' court  
8 claims in this case by its very terms.

9 Under the express terms of the contract, Parus may  
10 only proceed with a breach of contract claim in this action,  
11 and also under the terms of the UC Contract, as reflected in  
12 our summary judgment briefing, the amount of damages that  
13 Parus can recover is limited based on the express terms of the  
14 contract.

15 Now, Parus has refused to agree to a stay of discovery  
16 in case while Your Honor considers whether the terms of the UC  
17 Contract control the amount of damages in this case. Instead,  
18 Parus has served hundreds of written discovery requests and it  
19 has taken depositions, and all of that has primarily been  
20 geared to the discovery of the discovery process itself.  
21 Information that Debtors submit is completely irrelevant, if,  
22 as our summary judgment motion shows, only the terms of the  
23 contract at issue will control all of the parties' rights and  
24 liabilities in this case.

25 So this really presents a classic scenario where an

1 offer of judgment is appropriate. Debtors can offer a  
2 judgment based on their position, that the UC Contract limits  
3 Parus to a breach of contract claim and limits the damages it  
4 can recover under that contract, and, if Parus disagrees that  
5 the contract controls, then it can simply reject the offer of  
6 judgment or let the offer of judgment lapse without accepting  
7 it. If at the end of the case, Parus recovers more than what  
8 the Debtors offer, then the offer of judgment will have been  
9 of no consequence. If Debtors are correct, and Parus is  
10 limited to recovery under the terms of the contract, then the  
11 Debtors will have to pay the costs that Debtors incur after  
12 the offer of judgment is made.

13 So the Debtors believe that the offer of judgment will  
14 advance this case by requiring Parus to focus on and  
15 reevaluate its current position that the express terms of this  
16 contract are of no consequence here.

17 Now, Parus opposes the application of Rule 7068 on the  
18 basis that somehow it will relieve Debtors of discovery  
19 obligations. Obviously, Rule 7068 has no impact whatsoever on  
20 Debtors' discovery obligations. Debtors don't claim that it  
21 does. It won't affect the discovery obligations of either of  
22 the parties.

23 Parus also claims that it needs more discovery in  
24 order to evaluate the offer of judgment. As I mentioned, Your  
25 Honor, the Debtors' offer of judgment is going to be based on

1 the express terms of this contract. Parus has the contract.  
2 It has obviously evaluated what can be recovered under the  
3 contract. In fact, under the express terms of Rule 7068 and  
4 in the case law that is set forth in our reply brief, an offer  
5 of judgment can be made at any time even before discovery is  
6 undertaken, as long as it was more than 10 days before the  
7 trial of a matter.

8 So there is no prohibition against the Debtors making  
9 an offer of judgment prior to discovery going any further in  
10 this case. In fact, we believe it would be appropriate, given  
11 the type of discovery and the scope of discovery and the  
12 Debtors' position, that this contract in the end is going to  
13 control.

14 Now, Rule 7068 automatically applies in adversary  
15 proceedings. We would submit that this case really has  
16 proceeded much like an adversary proceeding, and we believe  
17 that the application of the offer of judgment rule here is  
18 appropriate under the circumstances.

19 JUDGE GONZALEZ: All right. Thank you.

20 MS. MURCH: Your Honor, Jill Murch on behalf of Parus  
21 Holdings. I would tender five responses to the Debtors'  
22 motion to have Rule 7068 apply. I pick up on Ms. Murdock's  
23 last statement, that Rule 7068 applies to adversary actions  
24 and that this proceeding is "much like an adversary action."  
25 But what I point out to the Court is that Rule 7068 applies

1 only to adversary actions, not contested matters. So their  
2 motion is procedurally improper. Rule 9014, which does apply  
3 to contested matters, specifies which adversary rules apply to  
4 contested claims litigation, and there is a litany of rules  
5 provided -- 7009, 7017, 7025. The list goes on and on, but  
6 yet, Judge, conspicuously absent from Rule 9014 is an  
7 incorporation by reference of Rule 7068 to contested claim  
8 litigation. Basically, the Debtors are asking you to go  
9 outside of the rule and apply this -- a rule that normally  
10 applies to adversary actions -- to contested claims  
11 litigation.

12 More importantly, the Debtors have not provided this  
13 Court nor have they provided Parus a single case to establish  
14 or to show where a bankruptcy court did, in fact, apply Rule  
15 7068 to contested claims litigation. It is procedurally  
16 improper, Your Honor.

17 I would also raise the second argument, that this  
18 motion is really duplicative of a summary judgment motion  
19 pending before the Court and this is why. The Debtors already  
20 contend in their summary judgment motion that their damages  
21 are limited; and, again, in their reply in support of the Rule  
22 7068 motion, they say "Debtors will base their offer of  
23 judgment upon the operation of these contractual terms." Now,  
24 either the court is going to agree with the Debtors or it is  
25 going to agree with Parus on the motion for summary judgment,

1 and the Rule 7068 motion adds nothing to this litigation.

2 I would posit, Your Honor, that, indeed, the Debtors'  
3 motion is nothing more than a thinly disguised cost-shifting  
4 motion. Realizing that the Debtors have no basis for  
5 cost-shifting, they made informal requests months and months  
6 ago, but have not followed up on it. They try now to get de  
7 facto cost-shifting through Rule 7068.

8 The Debtors say on page 4 of their reply brief, "Parus  
9 would only have to pay for the cost of discovery if it  
10 over-estimated its anticipated award." Your Honor, Rule 7068  
11 shouldn't be used as thinly veiled attempt to obtain  
12 cost-shifting. If the Debtors want cost-shifting, let them  
13 satisfy their burden and demonstrate that cost-shifting is  
14 appropriate under the seven factor test of the Zubulake case.  
15 The Debtors basically want the benefit of cost-shifting  
16 through Rule 7068, without the concomitant burden of putting  
17 on a prima facie case that cost-shifting is appropriate.

18 Your Honor, the fourth argument I tender to the Court  
19 is that the Debtors should not be allowed to use Rule 7068 as  
20 both a sword and a shield. As we stated along and along,  
21 again and again, the Debtors have failed to produce the very  
22 documents necessary to evaluate the damages claims, and I  
23 mention the litany of documents by Mr. Renforth, including  
24 hard copies of minutes, projections, Microsoft Word documents,  
25 Microsoft Excel documents, and Microsoft project documents.

1 None of these hard copy documents, which are separate and  
2 aside from the electronic dispute, have been produced. Where  
3 are they? Where are the hard copy documents? They are not  
4 sitting in an electronic vacuum. Where are they?

5 Yet the Debtors now ask the Court to direct Parus,  
6 outside of the rule, to evaluate its damages claims without  
7 the Debtors providing these very documents to Parus. Doing so  
8 would allow the Debtors to use Rule 7068 as both a sword and a  
9 shield, and the Court should not countenance such a practice.

10 Finally, the fifth argument, Your Honor, is even if  
11 Rule 7068 could have been procedurally proper, it is, indeed,  
12 at this point premature. Any assessment of Parus' damages  
13 claims hinges on (1) this Court's ruling as to summary  
14 judgment; and (2) more importantly, the Court's ruling as to  
15 Parus' spoliation motion. For example, if the Court grants  
16 Parus an adverse inference based on the Debtors' spoliation,  
17 this will factor prominently into Parus' damage calculations.

18 Therefore, Your Honor, we ask that the Court decline  
19 the Debtors' invitation to apply Rule 7068.

20 MS. MURDOCK: Your Honor, I have just two points.  
21 Your Honor absolutely has discretion to apply Rule 7068 here.  
22 There is no question as to the Court's discretion to apply the  
23 rule. The offer of judgment in essence is a type of  
24 cost-shifting. The Debtors acknowledge that judgment will be  
25 entered in this case on the breach of contract claim. We

1 acknowledge that. We acknowledge that the terms of contract  
2 provide that some damages will be paid. An offer of judgment  
3 is particularly appropriate where the parties disagree on the  
4 amount of damages, and, if Parus wants to proceed with what  
5 has been extremely costly litigation and lots of discovery on  
6 issues that we believe in the end are going to be irrelevant  
7 to the Court's analysis of the terms of the contract, that is  
8 the classic case for allowing Debtors to make an offer of  
9 judgment.

10 JUDGE GONZALEZ: All right. I will let you know where  
11 I am, hopefully, on April 4th.

12 Thank you.

13 MS. MURDOCK: Just to confirm, I take it that the  
14 Debtors' opposition to this spoliation motion is held in  
15 abeyance until further order of the Court?

16 JUDGE GONZALEZ: Yes.

17 MS. MURDOCK: Thank you.

18 JUDGE GONZALEZ: All right. I am going to terminate  
19 the phone call.

20 Have a nice day.

21 (Time noted: 10:57 a.m.)  
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C E R T I F I C A T E

STATE OF NEW YORK       )  
                                      : SS:  
COUNTY OF NEW YORK    )

I, DEBORAH HUNTSMAN, a Shorthand Reporter and  
Notary Public within and for the State of New York, do hereby  
certify:

That the within is a true and accurate  
transcript from the official electronic sound recording of the  
proceedings held on the 12th day of March, 2007.

I further certify that I am not related by blood  
or marriage to any of the parties and that I am not interested  
in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand  
this 16th day of March, 2007.

DEBORAH HUNTSMAN  
DEBORAH HUNTSMAN

PROOFREAD BY HALLIE CANTOR

ROUGH DRAFTS 1 AND 2 DELIVERED VIA E-MAIL 3/14/2007  
PRELIMINARY TRANSCRIPT DELIVERED VIA E-MAIL 3/15/2007

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK  
Case No. 02-13533

- - - - -x

In the Matter of:

WORLDCOM, INC.,

Debtor.

- - - - -x

U.S. Bankruptcy Court  
One Bowling Green  
New York, New York

May 15, 2007

2:03 p.m.

B E F O R E:  
HON. ARTHUR J. GONZALEZ  
U.S. BANKRUPTCY JUDGE

MOTION by Debtors to Apply Bankruptcy Rule 7068 (offer of judgment) to the Proceedings on Claim Numbers 11242 and 11173. Opposition by Parus Holdings, Inc.

MOTION of Debtors to Compel Claimant Parus Holdings, Inc. to Appear for a Properly Noticed Rule 30(b)(6) Deposition. Opposition Filed.

Transcribed By: Esther Accardi

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1 P R O C E E D I N G S

2 THE COURT: Hello. This is Judge Gonzalez. Hello,  
3 are the parties on the phone?

4 MS. MURDOCK: Debtors are appearing by Allison  
5 Murdock.

6 MS. MURCH: Yes, Your Honor. Jill Murch on behalf of  
7 Parus Holdings.

8 THE COURT: All right. In light of the opinion that  
9 I issued, I guess it was last week or the week before, I  
10 thought it would be appropriate to have the status conference  
11 to focus on what the next step is. It seems to me that the  
12 motion to compel discovery etcetera is not really relevant any  
13 longer. As well as the motion by the debtors of the offer of  
14 judgment I don't think really serves any purpose either. And  
15 what we need to focus on is determining what the amount of the  
16 damages are. And the dispute seems to be between the two  
17 amounts as a basic charge versus the, what I call -- I don't  
18 have it in front of me, the more inclusive flat rate charge.  
19 And then resolve that issue through an evidentiary hearing and  
20 then let the parties exercise whatever appellate rights they  
21 may choose to do so thereafter. And so with that in mind, I  
22 think the debtor should either withdraw the offer of judgment,  
23 if they want me to rule on it I'll rule on it. But I would  
24 exercise my discretion even if it were -- if it could be done  
25 in the context of an objection to claim -- exercise discretion

1 under the circumstances not to do it. And with respect to the  
2 discovery issue is have the parties focus on that discovery  
3 that is relevant to the issue as to what was the parties'  
4 intention or how to interpret that provision in calculation of  
5 the damages as to what amount is to be used. I'll hear first  
6 from the debtor.

7 MS. MURDOCK: Your Honor, Allison Murdock on behalf  
8 of the debtors. With regard to the motion to compel we agree  
9 with Your Honor that the reasons that we were seeking that at  
10 deposition have been severely limited and rendered moot by the  
11 Court's written opinion. The only issue that really remains  
12 with respect to caution fees. But because the Court should so  
13 narrowly focus the remaining issue in the case, presumably the  
14 parties can agree upon appropriate search terms and appropriate  
15 data disbursement to substantially reduce the cost that would  
16 be associated with electronic discovery. So it really would  
17 make sense that the parties should go back to the table and see  
18 whether we really are talking about substantial costs on  
19 electronic discovery before we proceeded down the road of  
20 caution fees. One thing that the debtors did seek the Rule  
21 30(b)(6) for we thought in it's spoliation motion, we believe  
22 that motion has been rendered moot by the Court's order because  
23 that goes exclusively to Parus' claim for expectation damages  
24 under the UC contract which Your Honor held are not  
25 recoverable. And I was advised by Ms. Burch last night however

1 that Parus did not believe that's their spoliation motion had  
2 been rendered moot. And she did not explain why -- wasn't sure  
3 how this could be the case given that that motion -- given that  
4 the only issue in the case is whether they -- that the base for  
5 the unlimited price was going to apply to the full  
6 reconciliation payments they're owed under the UC contract.  
7 That spoliation motion does not go to price at all, it doesn't  
8 deal with price at all. The thing that it deals with, the  
9 entire motion is on Parus' claim that it needed to support the  
10 claim for expectation damages and whether there could be  
11 documents on backup cases for this pending spoliation. And  
12 setting aside and there's a lot, preserving on backup case can  
13 be spoliation because the expectation damages are not withheld  
14 alone and depending on contracts they're irrelevant in that the  
15 debtors will produce those documents even it were true,  
16 couldn't be spoliation. So that definite issue that remains  
17 with respect to the 30(b)(6) is the fact that their spoliation  
18 motion had been rendered moot and we believe that as a result  
19 of that we don't need that 30(b)(6) on spoliation issues.

20 THE COURT: All right. What about the offer of  
21 judgment?

22 MS. MURDOCK: Your Honor, given that the damages have  
23 been limited as to -- if we can agree on the parameters -- I  
24 suppose it depends in part on what position Parus is taking.  
25 If spoliation is still on the table and we're going to incur

1 substantial costs in shaping down discovery on matters, that at  
2 least debtors respectfully submit are irrelevant, then we would  
3 like the ability to still make an offer of judgment within the  
4 parameters of the Court's summary judgment ruling. Keeping in  
5 mind that the Court now has said it's dealing on the damages  
6 that Parus is going to be able to recover.

7 THE COURT: All right. Parus Holdings.

8 MS. MURCH: Your Honor, Jill Murch, Foley & Lardner,  
9 on behalf of Parus Holdings. A couple of things here. We do  
10 believe that spoliation still remains relevant. And there's a  
11 very simple reason why. Ms. Murdock has raised and is  
12 describing the issues before the Court, but what I would  
13 caution to the Court is and we argued before the Court  
14 previously and in our papers, is that James Renforth who  
15 negotiated the terms of the UC contract between InterMedia and  
16 Parus. He had a whole host of documents in his office  
17 conspicuously labeled, word documents, Microsoft product  
18 documents, excel spreadsheets, that all dealt with the term  
19 pricing issues related to the contract. That would even be  
20 relevant to the narrow issue before this Court now. And so to  
21 say that it's not relevant is not accurate because if that's  
22 the case then Parus should be entitled to an inference in terms  
23 of damages. We have not received any of those documents, those  
24 hardcopies, we're not even talking electronics we're talking  
25 about --

1           THE COURT: All right. I understand that. But what  
2 does that got to do with this spoliation motion which was  
3 focused on the electronic discovery. What is it -- I think  
4 what we need to do is just focus on that issue and the  
5 discovery related to the appropriate damage calculation in the  
6 context of the opinion that was rendered. And then from there  
7 we can get a better understanding of really what is at issue  
8 and whether or not any motion needs to be adjudicated as to a  
9 spoliation issue at all. I really don't know what the debtor  
10 has, what they claim they don't have, and why they don't have  
11 it, whether or not this person is available. I don't know the  
12 details of that and I'm not going to go through them now. But  
13 it seems to me that the parties need to get together, focus on  
14 what remains based upon the opinion as rendered. And move  
15 forward and let's get an answer, at least from a court's  
16 determination as to what is the appropriate damage, and if it  
17 is relevant to consider whether there is any shifting of the  
18 burden, I'll consider it. But it doesn't seem to me that I  
19 have really focused in on that to the point where I can  
20 determine that it is relevant to go forward. Because most, if  
21 not all, of the argument that I recall being made about  
22 spoliation all had to do with the responsibility and  
23 obligations to maintain certain electronic records.

24           MS. MURCH: Judge, this is Jill Murch. Actually,  
25 there was a significant portion of the briefing that was

1 dedicated exclusively to the debtor's failure to provide  
2 hardcopy documents. Well, I agree that electronic discovery  
3 was a component that was not the only component.

4 THE COURT: But electronic -- hardcopy documents  
5 regarding what issue?

6 MS. MURCH: Regarding the very specific issue of the  
7 UC contract and InterMedia One as well as damages. And  
8 frankly, these are all documents that James Renforth, a key  
9 witness in the case, had in his office, but for some reason now  
10 no longer exists or is yet to be produced by the debtors to  
11 Parus. But my only hesitation is we can go back to the debtors  
12 and say we want it again but we're still not going to get it  
13 and the spoliation motion still remains relevant. We took a  
14 deposition. In fact, it was over, I believe, eight hours of  
15 Mr. Renforth about what documents did you have, where did you  
16 put them, what did they relate to and that's all very much  
17 detailed in the spoliation motion. We haven't gotten those  
18 documents and that was a major part of the spoliation motion,  
19 the hardcopy documents. The documents of the key person that  
20 can even shed light on wire issues but also the very specific  
21 issue that this Court wants the parties to address.

22 THE COURT: All right.

23 MS. MURDOCK: Your Honor, may I?

24 THE COURT: Go ahead.

25 MS. MURDOCK: Your Honor, with regard to Parus'

1 spoliation motion, they address the relevancy of the documents  
2 in their spoliation motion on page 59. The documents that they  
3 claim were not preserved by the backup tape rather than being  
4 readily accessible were revenue reports and projections,  
5 business reports, marketing studies, financial analyses of  
6 InterMedia One and the products from Unified Methagene. All of  
7 that was lost revenue expectation damages which this Court had  
8 already said are not recoverable. Now perhaps Ms. Murch has  
9 some issue with pricing, if she does it's not in this  
10 spoliation motion, that is not what this spoliation motion was  
11 about, it was about the expectation damages that Parus is  
12 claiming its entitled to recover. And that's on page 59, where  
13 they themselves describe the relevancy of the documents being  
14 addressed in their spoliation motion.

15 THE COURT: All right. What I think I'll do is I  
16 need to be better prepared for this. What I expect to do is  
17 rule next Tuesday at 2 o'clock unless you hear to the contrary.  
18 I'll review the motion. But assuming the facts are as alleged  
19 by the debtor it would seem to me that what needs to be  
20 discovered are what the party's intention were on a contract  
21 and not what happened thereafter, and whether what amount was  
22 to be used to calculate the damages under the applicable  
23 provision. And if the facts are as alleged by Parus Holding  
24 then maybe I have to then move forward with an adjudication of  
25 exfoliation motion. But I thought it was far more simpler than

1 it seems to be as is being presented by the parties. I'll  
2 review the papers. And in the interim I still think you both  
3 need to focus on how to narrow the discovery and address the  
4 specific issue as to what is the intention of the parties in  
5 determining or in agreeing upon what would be the basic  
6 calculation of the damages under the appropriate damage  
7 provision. With that said we can have this return for a ruling  
8 next Tuesday, 5/22 at 2 p.m. Just check the agenda to make  
9 sure it's going forward at that time. And if it's not going  
10 forward on that date chambers will contact one or both of you  
11 and ask that person to contact the other.

12 MS. MURDOCK: Yes, Your Honor. Thank you, Your  
13 Honor.

14 MS. MURCH: Thank you very much, Your Honor.

15 THE COURT: Thank you.

16 (Proceedings concluded at 2:16 p.m.)  
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C E R T I F I C A T I O N

I, Esther Accardi, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

\_\_\_\_\_  
Signature of Transcriber

May 17, 2007\_\_\_\_\_  
Date

Esther Accardi\_\_\_\_\_  
typed or printed name

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